In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 663

RENE BARDA, APPELLANT

v.

UNITED STATES OF AMERICA AND MCA INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MOTION OF THE UNITED STATES TO DISMISS

Pursuant to Rule 16(1)(a) of the Revised Rules of this Court, the United States moves that the appeal be dismissed.

STATEMENT

This is a direct appeal from an order denying intervention in a government civil antitrust suit. The motion for leave to intervene was made and denied under the following circumstances:

On July 13, 1962, the United States filed a civil antitrust action (R. 2), against appellee MCA, Inc. ("MCA"). The suit named certain of its subsidiaries, including MCA Artists, Ltd. ("Artists"), as co-conspirators. The complaint alleged that MCA and its subsidiaries have a substantial share of the talent

agency business and represent most of the important motion picture talent in all entertainment fields as actors, directors, writers, musicians, than any other talent agency; and that they are also the principal producers and sellers of network television programs. The complaint charged, among other things, that MCA combined and conspired to restrain and to monopolize the talent agency business, the production of television network programs, and the sale of television network programs to prime time, in violation of Sections 1 and 2 of the Sherman Act. The relief requested included the dissolution by MCA of Artists, which was engaged in the talent agency business, and all other talent agency subsidiaries and affiliates, and an injunction against MCA engaging in the talent agency business.

The United States simultaneously filed a motion for a temporary restraining order (R. 19) to enjoin MCA from taking any action to divest itself of Artists, or any other talent agency subsidiary, on the ground that a decree relief against the violations alleged in the

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The talent agency business was described in the complaint as consisting of representing actors, actresses, producers, directors and performing talent in the entertainment business, in exchange for 10 per cent commissions on gross earnings. (R. 4, Complaint, Par. 10). "Talent" was defined in the complaint (Par. 11, R. 5) as meaning actors, actresses, producers, directors and writers who have achieved professional recognition by the entertainment industry and by the public through professional experience in motion pictures or television.

The complaint also charged that MCA had violated Section 7 of the Clayton Act by acquiring a controlling interest in Decca Records, Inc., the fourth largest recording company in the United States, and its subsidiary, Universal Pictures Company, Inc., a leading motion picture film producer.

complaint might be thwarted by unilateral action. The district court granted this motion (R. 25), and, after hearing (R. 25), denied MCA's motion to vacate and dissolve the temporary restraining order (R. 32).

By stipulation and order entered on July 23, 1962 (R. 98-103), MCA and its subsidiaries were required, among other things, to take steps immediately to terminate their talent agency contracts and also to cease acting as talent agents. The order expressly reserved their right to receive compensation and commissions for past services (Par. 4), and provided that the rights and obligations of third parties were to remain unimpaired (Par. 11).

On August 20, 1962, appellant moved to intervene (R. 114-167), both as of right and on a permissive basis, under Rule 24 of the Federal Rules of Civil Procedure. His claim for intervention alleged, in substance, that he was the plaintiff in two damage suits in the United States District Court for the District of Nevada against Artists, among others, arising out of its alleged failure to perform its duties as his talent agent; that pursuant to the foregoing stipulation and order of July 23, Artists had terminated its talent agency contracts from which substantial commissions and profits would have been derived; that the government's complaint in the antitrust suit sought the dissolution of Artists and that the effect of the stipulation and order of July 23 had been to put Artists out of the talent agency business; that Artists had no reason to remain in existence and that it would be liquidated and dissolved and its assets transferred to MCA, its parent; that, as a consequence of

the foregoing, the collectibility of any judgment [illegible] might obtain in his Nevada suits was placed in [illegible] and that he was therefore entitled to intervene in order to postpone the posting of a bond or the retention of sufficient assets by Artists to satisfy any judgment he might obtain.

Both the United States (R. 184) and MCA (R. 193) opposed the motion to intervene. MCA filed an affidavit (R. 217) which stated, among other things, that Artists "remains an existing corporation and it is still able to respond to any judgment which M. Bardy [appellant] may recover * * *," and that (R. 217-218):

> (1) MCA Artists, Ltd. has very substantial sums payable to it by its former clients for past services rendered; (2) there have been no steps taken, and no present intention to take any steps, to dissolve or liquidate MCA Artists, Ltd.; (3) in any event, if such were to take place, the dissolution or liquidation would have to take place under Delaware law, which in common with general corporate law, requires the rights of creditors to be protected. MCA Artists, Ltd. has and will have ample assets to cover any possible recovery by M. Bardy * * *

The district court denied the motion to intervene [illegible] (R. 223, App. A1) that "there is no ground either for intervention of right pursuant to Rule 24(a) [illegible] for permissive intervention pursuant to Rule 24(b) [illegible] this appeal challenges only the denial [illegible] appellant to [illegible] (R. 223; J.S. App. A2).

nial of intervention as of right under Rule 24(a) (R. 237; J.S. 3).

ARGUMENT

The district court correctly denied appellant intervention as of right. Rule 24(a)(3), the sole provision upon which appellant relies (J.S. 3, 9, 10), grants a right to intervene "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." To come within this provision, an applicant must show (1) that he has a legally protected interest in the property subject to the control of the court and (2) that the court's disposition of the property will unduly prejudice his interest in the property. *See United States* v. *California Cooperative Canneries*, 279 U.S. 553, 556; *International Mortgage & Investment Corp.* v. *Von Glahn*, 201 F. 2d 857, 862 (C.A. 2); *Board of Commissioners of Sweetwater County, Wyo.* v. *Hampton*, 71 F. 2d 913, 915, 916 (C.A. 10), certiorari denied, 293 U.S. 71; *Rockford Iron Co.* v. *Appalachian Electric Power Co.*, 62 F. 2d 940, 943 (C.A. 4); *In re Grand Union Tea Co.*, 73 F. Supp. 242, 243 (S.D.N.Y.); Moore, *Federal Practice*, 2d Ed., ¶ 24.09[2].

Appellant does not claim that [illegible] intervention under Rule 24(a)(3). He does not claim a protected interest in Artists' property; he has only

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A consent judgment was entered in the district court on October 18, 1962. The judgment enjoined Mr. Ward from [illegible] salaries from, among other things, [illegible] interest in the talent agency business, but expressly preserved their right to receive compensation and commissions for past services.

an unadjudicated claim against the company, now the subject of pending litigation, on which he may never prevail. Nor has appellant shown that he will be "adversely affected" by the termination of Artists' talent agency contracts. For the order and stipulation of July 23 expressly preserve Artists' right to receive the substantial compensation now owing to it for past services (see MCA's affidavit, *supra*, p. 4); and Artists, as a Delaware corporation, would be required to protect the rights of creditors if it were dissolved. 8 Del. C. §§ 275 *et seq.* In these circumstances, the curtailment of Artists' future earning power which may result from termination of its talent agency is not sufficient to show that its financial ability to satisfy any judgment appellant may obtain against it would be impaired. Cf. *Sutphen Estates, Inc.* v. *United States*, 342 U.S. 19, 22.

CONCLUSION

Since appellant was not entitled to intervene as of right, the order denying intervention is not appealable and the appeal should be dismissed. *Sun Ex Publishing Co.* v. *United States*, 366 U.S. 683, 687 n.8, 695; *Sutphen Estates, Inc.* v. *United States*, *supra*.

Respectfully submitted.

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